UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32[1]

COMCAST OF FRESNO, INC. AND
COMCAST OF SIERRA VALLEYS, INC.
Employers

and

FRANZ F. MALCHER II, an Individual
Petitioner

Case 32-RD-1479

and

COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 9408, AFL-CIO
Union

REPORT AND RECOMMENDATION ON OBJECTIONS

Acting pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned has caused an investigation of the Union's objections to be conducted and recommends that the objections be overruled in their entirety, and, because the Union has failed to receive a majority of valid votes cast in the election, that a Certification of Results be issued.

The Election

The Petition in this matter was filed on March 29, 2005.[2] Pursuant to a Stipulated Election Agreement approved on April 11, an election by secret ballot was conducted on May 12 in the following unit:

> All full time and regular part-time employees employed as Broadband Sales & Service Tech 1A, 1B, and 2, Broadband (HSD) Coordinator, Dispatcher I & II, Dispatch Systems Operator, Construction Tech 1B, 2, &3, Fiber Tech, System Tech 1,2, &3, Converter Control Clerk I & II, Converter Control Coordinator at

[1] Herein called the Board.
[2] All dates hereinafter refer to calendar year 2005.

the Employers' facilities located at 2442 N. Grove Industrial Drive, Fresno, California and 1031 N. Plaza Drive, Visalia, California; **excluding** all lobby employees, check-in employees, warehouse employees, Direct Sales groups, Headend Technicians, administrative employees, professional employees, office clerical employees, guards, and supervisors as defined in the Act.

The Tally of Ballots served on the parties at the conclusion of the election showed the following results:

Approximate number of eligible voters……..……..158
Number of void ballots……...……0
Number of votes cast for CWA Local 9408…….….57
Number of votes against participating labor organization…….92
Number of valid votes counted…….……...…149
Number of challenged ballots…….…….…..…..1
Valid votes counted plus challenged ballots……...…….150

Challenged ballots were insufficient in number to affect the results of the election. Thereafter, the Union filed timely objections to the election, a copy of which was served on the Petitioner and the Employers by the Region.

The Objections

Objection No. 1

1. The employer has maintained and enforced unlawful rules.

In support of this objection the Union cites a number of provisions in the Employer's employee handbook, dated October 2, 2003, which it contends are unlawful, and therefore, objectionable. The investigation failed to establish that the following provisions are either unlawful or otherwise grounds for setting aside the election:

Updates to policies and programs will be announced to employees on Team Comcast as they happen.

The Union asserts that this provision is unlawful because it indicates that the Employer will not bargain over such changes. However, the statement does not disavow the Employer's bargaining obligation under the Act, for it is silent as to the process by which changes may come about. Indeed, the handbook includes a provision stating as follows, "I understand that if there is

a difference between what is stated in the Employee Handbook and any…collective bargaining agreements, the…collective bargaining agreements will govern." Thus, I find no objectionable disavowal of the Employer's obligation to bargain when required. Moreover, I note that the parties' collective-bargaining agreement includes a management rights clause allowing changes in work rules, so long as such changes are not inconsistent with express provisions of that agreement. In these circumstances, I find that the statement in question, which does not directly impact employee activities, has not been shown to be either unlawful or objectionable.

Employees with questions regarding attendance should speak to their supervisor or Human Resources Representative.

The Union contends that the above suggests that employees may not talk to a union representative. However, the statement does not prohibit such communications and has never been enforced in that manner. Rather, it encourages employees to bring attendance questions to the Employer, which is not inherently unlawful or objectionable.

Being rude or discourteous to a customer, potential customer, co-worker, contractor or vendor.

The Union asserts that this provision is unlawful because it discourages arguments about Unions. However, the provision in question does not explicitly restrict protected activities, nor is there any evidence that it was promulgated in response to union activity or that it has been applied to restrict protected activity. Moreover, the provision would not reasonably be interpreted by employees as restricting protected activities. See *Lutheran Heritage Village-Livonia*, 343 NLRB No. 75 (2004). Thus, I do not find this provision to be unlawful or objectionable.

Deliberate interference with Company operations, work or production.

The Union alleges that the above is unlawful because it prohibits employees from engaging in protected concerted activity, including striking. However, the rule does not explicitly restrict strikes, concerted work stoppages, or other protected activities, and there is no evidence that it has been enforced against such conduct or was adopted in response to it. Moreover, it does not

appear that employees reasonably would view such language, standing alone, as restricting them from engaging in protected activities. In any event, I further note that the collective bargaining agreement long in effect between the Union and the Employer includes a no-strike provision. Based on the above, the provision is not unlawful or objectionable.

> *Misuse of Company resources, including, but not limited to, e-mail, internet, telephone and/or voice-mail.*

Although the Union claims that the above rule is unlawful because it is overly broad, there is nothing in the rule that explicitly or selectively restricts protected activity. Accordingly, as I do not find that the rule would be reasonably understood by an employee as prohibiting any activities protected by the Act, it would not be unlawful or objectionable.

> *Oral or written requests for employee information or file materials from sources outside of Comcast will not be provided unless the employee has signed a written authorization to release that information or a valid subpoena has been received by Comcast.*

The Union asserts that this provision is unlawful because it conflicts with a general obligation under the Act for an Employer to provide to the Union employee information for representational purposes. However, there is no evidence that the Employer has used that statement as a basis for refusing to provide the Union with requested information. Rather, the context of the rule, namely, a section of the handbook addressing personal employee information, makes clear that the intent of the statement is to assure employees that they will be protected from disclosures to other outside entities. In any event, it does not appear from the investigation that this statement remains in effect. Thus, I do not find this provision to be either unlawful or objectionable.

> *I understand that Comcast may change or revise the Employee Handbook at any time in its sole discretion and without notice.*

The Union contends that provision is unlawful because the Employer is essentially disavowing its bargaining obligation with the Union. I note, however, that the following

paragraph in the acknowledgment section states, "I understand that if there is a difference between what is stated in the Employee Handbook and any applicable policies, benefit plan documents, or collective bargaining agreements, the policies, benefit plan documents, and collective bargaining agreements will govern." Further, the most recent collective-bargaining agreement between the Union and Comcast contains provisions that appear to allow the Employer to make changes in work rules so long as they are not inconsistent with express provisions of the agreement. In these circumstances, there is insufficient basis from which to conclude that the acknowledgment statement, which does not directly impact any employee activity, would be reasonably viewed by employees as an unlawful repudiation by the Employer of its bargaining obligation, particularly where, as here, there has been no showing that the Employer has acted inconsistent with that obligation. Accordingly, this provision is neither unlawful nor objectionable.

I further find that the following handbook provisions are also not grounds for setting aside the election:

> *Comcast employees may learn or have access to sensitive information concerning Comcast's business. Employees may also be entrusted with confidential information concerning customers and/or co-workers such as names, address, phone number(s), billing information, and selection of services.*

Including as examples:

> *Unauthorized or improper use of confidential customer or co-worker account or other information.*
>
> *Communicating in a public forum about Comcast's business operations, products or services unless expressly authorized to do so.*

The Union contends that the above Employers' Confidentiality policies in the Handbook unlawfully restrict employee discussions of wages, hours and working conditions. The Union also contends that the Employers' Electronic Security policies in the Handbook unlawfully restrict employee discussions of wages, hours and working conditions, including discussions in a public forum. The Electronic Security policy requires employees "to maintain the

confidentiality of information about Comcast, its customers and its employees and to take precautions to protect unauthorized or careless disclosure of this information." The Electronic Security policy also states: "Communicating in a public forum about Comcast's business operations, products or services unless expressly authorized to do so is also prohibited. Public forums include, but are not limited to, newsgroups, forums, chat-rooms, radio, print, etc."

With respect to these handbook rules about confidentiality, electronic security, and communicating in a public forum, even assuming that each of these rules is unlawful, there is no evidence establishing that the maintenance of these rules interfered with the election.

The Union has provided evidence to establish that when the Employers began using the On-Line Comcast Employee Handbook in about October 2003 employees were asked to acknowledge that they had been given instructions on how to access a copy of this handbook on the Comcast intranet site. The version of the Employee Handbook which was available on the intranet during the critical period was in excess of 140 pages and the original October 2003 version was over 100 pages long. The On-Line Handbook is available for employees to access over the Employers' intranet at any time, but the Union has not provided any evidence that any employees did access the Handbook over the intranet during the critical period preceding the election. There is no evidence that during the critical period the Employers called any employee's attention to the rules on confidentiality, electronic security or communicating in a public forum.

Prior to the election, the sections of the Handbook on Confidentiality, Conduct, and Electronic Security were last revised in September 2004. There is no evidence that these rules were either adopted by the Employers in October 2003 or revised in September 2004 in response to any Section 7 activities engaged in by the Employers' employees working out of the Fresno and Visalia facilities.

Although the Union alleges otherwise, it did not provide any evidence that the rules on confidentiality, electronic security and communicating in a public forum were enforced to restrict employees from engaging in activities protected by Section 7 of the Act, nor is there any evidence that any employees were deterred from engaging in Section 7 activities by these handbook rules.

In *Delta Brands, Inc.*, 344 NLRB No. 10 (2005), the Board found that:

"It is well settled that '[r]epresentation elections are not lightly set aside.' *NLRB v. Hood Furniture Mfg. Co*., 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Thus, '[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees.' Id. Accordingly, 'the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one.' *Kux Mfg. Co. V. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989) (internal citation omitted). The objecting party must show, inter alia, that the conduct in question affected employees in the voting unit, *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence that unit employees knew of alleged coercive incident), see *Antioch Rock & Ready Mix*, 327 NLRB 1091, 1092 (1999), and had a reasonable tendency to affect the outcome of the election. Id."

Delta Brands did not involve an incumbent union and was an election in an effort to have a union newly certified as a bargaining agent. In *Delta Brands* the Board found that the union did not meet its burden to show that the no-solicitation rule affected unit employees and had a tendency to affect the election results. The Board noted that the no-solicitation rule was contained in a thirty-six page policy manual with a large number of work rules, and there was no evidence that the rule was enforced. The Board majority found that it was not axiomatic that the maintenance of an overly broad rule warrants setting aside the election even assuming that the maintenance of an overly broad rule is an 8(a)(1) violation. The Board majority concluded in *Delta Brands*:

"In the instant case, we have the mere presence of an overbroad rule in a much larger document, with no showing that any employee was affected by the rule's existence, no showing of enforcement, and indeed no showing of any mention of the rule. In short, there is no showing the mere existence of the rule could have affected the results of the election."

In *Delta Brands*, the Board majority also found that their decision was supported by the analysis in *Safeway, Inc*., 338 NLRB 525 (2002). In *Safeway*, a case which also involved a decertification election as in the instant case, the Board found that the maintenance of an arguably overly broad confidentiality rule during the critical period was not a basis for setting aside the election, stating:

"Of primary significance in our consideration of this issue is that the employees were represented by the Union at all times material to this case…There is no indication that the confidentiality rule has ever been enforced, or that it has placed any impediment on the ability of employees to discuss terms and conditions of employment with the Union, or with other employees. To the extent that any employee was confused about their statutory right to do so, the Union was ideally placed to advise employees of their rights. There is no evidence that the Union was ever called upon to do so, or that, prior

to decertification, the Union viewed this rule as in any way infringing on employees' Section 7 rights."

The Board went on to stress in *Safeway*, that the confidentiality rule did not expressly prohibit employees from discussing wages, hours and conditions of employment with the union or with each other. The Board majority also found it highly improbable that the employees who had been represented by the union for a period of years would have drawn the inferences from the employer's confidentiality rule that it meant that they were prohibited from discussing wages and working conditions with each other or their union. Based upon the facts in that case the Board concluded that, "it is virtually impossible to conclude that the maintenance of the confidentiality rule had any effect on the election results," and they overruled the union's objections.

In *Delta Brands*, the Board majority found that even though that case did not involve an incumbent union, their decision was supported by the *Safeway* approach, and found that the mere maintenance of an overly broad rule was not a basis for setting aside the election. The arguments made by the Board majority in *Delta Brands* apply to the instant case, and in this case there is the added argument made by the Board in *Safeway* regarding the ability of the incumbent union to advise employees of their Section 7 rights. Even assuming that the confidentiality, electronic security and communicating in a public forum rules are overly broad, the Union has merely presented evidence that these rules were maintained during the critical period before the decertification election. These rules were contained in a much longer handbook than the policy manual containing the no-solicitation rule in *Delta Brands*. There is no evidence that any of the Employers' employees were affected by the allegedly overly broad rules during the critical period before the decertification election, and there is no evidence that any of these rules were enforced at any time to prevent employees from discussing wages, hours and conditions of employment with each other or discussing them with the Union. The Union has not met its burden to show that allegedly improper handbook rules affected the employees in the voting unit and that they had a reasonable tendency to affect the outcome of the election.

Based on all of the above, I recommend that the Objection No. 1 be overruled.

<u>Objections Nos. 2, 3, 4, and 6</u>

2. The employer offered discriminatory benefit.

3. The employer failed to bargain in good faith both before the critical period and thereafter.

4. The employer made unilateral changes both before the critical period and during the critical period.

6. The employer otherwise failed and refused to bargain in good faith.

The Union contends that the Employers unilaterally ended its STIP incentive plan and replaced it with another incentive plan called GAIN without bargaining with the Union about this change in benefits. Furthermore, the Union contends that the Employers informed employees in the bargaining unit that only non-unit personnel would be eligible for this benefit unless the Union negotiated this benefit with the Employers.

The critical period during which conduct that would warrant the setting aside of an election is the period between the filing of a petition and the date of the election. *Ideal Electric and Manufacturing Co.*, 134 NLRB 1275 (1961). The investigation revealed that employees were notified in the summer of 2004 that the STIP incentive plan would end at the end of 2004. The collective bargaining agreement contains language about the STIP plan allowing the Employer to terminate the plan as long as it is terminated for both bargaining unit employees and non-represented employees.[3] The letter to employees in the summer of 2004 also informed employees that a new incentive plan called GAIN would be created in 2005, but details were not provided at that time. It appears that during the first half of March 2005 the Employers' managers conducted meetings with the unit employees working out of the Fresno and Visalia facilities informing them that the GAIN incentive program was not available to bargaining unit employees unless and

[3] Article 18 E. of the contract which the Employers had with the Union (it was negotiated when they were AT &T Employers before they became Comcast affiliated Employers) states:
"During the life of this Agreement, unit personnel shall be eligible for the Employer's Short Term Incentive Plan on the same terms and conditions as other Central California Market employees of the Employer in the same job classifications. AT & T Broadband and the Employer shall have the right to add to, delete, or modify the Plan unilaterally and in its sole discretion, without any obligation to bargain, provided that such changes are uniformly applied to unit and non-unit employees in the Central California Market in the same classifications. Any determination regarding the Plan, including performance management criteria and application, shall not be subject to the Grievance and Arbitration procedure of this Agreement."

until it was bargained between the Union and the Employers.[4] By letter dated March 23, Marie Malliett from Communication Workers Association, District 9, objected to Comcast headquarters that the Employers had decided to provide GAIN to Central California employees who were not represented by CWA while excluding Union represented employees in Fresno and Visalia. The decertification petition was filed on March 29, 2005. Thus, it is clear that both the bargaining unit employees and the Union were aware that the Employer was excluding the Union-represented employees from the GAIN incentive plan prior to the filing of the petition. There was neither evidence, nor the contention, that the Employer made any other unilateral changes in the terms and conditions of employment for bargaining unit employees during the critical period. Accordingly, as the Union's objections about the unilateral change in incentive plans deal with events which took place outside the critical period, they are not a basis for setting aside the election. *Gibraltar Steel Corp*., 323 NLRB 601, 603 (1997); *Accubuilt, Inc*., 340 NLRB 1337 (2003). Accordingly, I recommend that the Objections Nos. 2, 3, 4 and 6 be overruled.

Objection No.5

> 5. The employer furthermore refused to provide information necessary and relevant for bargaining.

The Union alleges that the Employers refused to provide information necessary and relevant for bargaining. As the objecting party, the Union has the sole burden of providing evidence in support of its objection. *City Wide Insulation of Madison, Inc.*, 338 NLRB 793 (2003). To satisfy this burden, the Union may specifically identify witnesses who would provide direct rather than hearsay testimony to support its objections, specifying which witnesses would address which objections. Id., *Heartland*

[4] The Union contends that the language in the collective bargaining agreement means that when the GAIN program was implemented the unit employees were entitled to the same incentive plan benefits as the non-union employees. The Employers contend that the relevant section of the contract only deals with STIP and changes in that plan, and that GAIN is a new incentive plan that is a different type of plan not covered by the contract language. STIP was a national incentive plan that Comcast employers continued after taking over AT & T Broadband facilities, and GAIN is a regional incentive plan for Comcast employers. The Union has filed a grievance about the change to the GAIN plan, and also filed case 32-CA-21967-1 about the change. That charge has been deferred to the grievance procedure.

of Martinsburg, 313 NLRB 655 (1994); *Holladay Corp.*, 266 NLRB 621 (1983). In the alternative, the Union may provide specific affidavit testimony and other specific evidence in support of its objections. *City Wide Insulation of Madison, supra*. This evidence or description of evidence must be provided to the Regional Office "within 7 days of the day the objections are required to be filed or within such additional time as may have, upon a timely request, been allowed by the Regional Director." Id. (quoting from NLRB Casehandling Manual (Part Two) Section 11392.6). On May19, this office advised the Employer, in writing, that evidence in support of its objection was due in the Regional Office no later than Tuesday, May 26. To date, the Union has failed to submit any evidence in support of its objection no. 5 regarding the refusal to provide information necessary for bargaining. Accordingly, I recommend that the Objection No. 5 be overruled.

DATED AT Oakland, California this 5th day of October, 2005.[5]

__/s/ Alan B. Reichard_____

Alan B. Reichard
Regional Director
National Labor Relations Board
Region 32
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[5] Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the National Labor Relations Board, 1099 14th Street, NW, Washington, DC, 20570-0001. Pursuant to Section 102.69(g), affidavits and other documents which a party has submitted timely to the Regional Director in support of objections are not part of the record unless included in the Report or appended to the exceptions or opposition thereto which a party submits to the Board. Exceptions must be received by the Board in Washington, DC by October 19, 2005.